IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1131

Bernard Hamlet,

Petitioner,

v.

National Labor Relations Board

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE SEVENTH CIRCUIT

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February 28, 1972

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BERNARD HAMLET,

Petitioner.

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Bernard Hamlet, prays that a Writ of Certiorari be issued to review a final order of the United States Court of Appeals for the Seventh Circuit dismissing petitioner's Petition for Review of an Order of the National Labor Relations Board.

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Seventh Circuit sustaining respondent's Motion to Dismiss petitioner's Petition for Review of an Order of the National Labor Relations Board was entered December 7, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit has the authority to review final orders of the National Labor Relations Board?

2. Whether the United States Court of Appeals for the Seventh Circuit erred by dismissing petitioner's Petition for Review of an Order of the National Labor Relations Board on the grounds that it did not have jurisdiction to review a final order of the National Labor Relations Board?

3. Whether an investigation conducted by the National Labor Relations Board arising out of petitioner's complaint charging an unfair labor practice against his union, comports with the due process requirements of the 5th Amendment to the United States Constitution where the National Labor Relations Board in the course of its investigation conferred only with the union?

4. Whether the action of the General Counsel acting on behalf of the National Labor Relations Board in refusing to issue an unfair labor complaint represents the final order of the National Labor Relations Board and therefore reviewable by a Court of competent jurisdiction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 5th Amendment to the United States Constitution provides in pertinent part as follows:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

29 U.S.C.A. Section 158 (b) (2) provides in pertinent part as follows:

"It shall be an unfair labor practice for a labor organization or its agents:

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section . . ."

29 U.S.C.A. Section 153 (d) provides in pertinent part as follows:

"There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four (4) years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the Regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law . . ."

29 U.S.C.A. Section 160 (f) provides in pertinent part as follows:

"Any person agrieved by final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the Circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business . . ."

STATEMENT OF THE CASE

This case originated from charges brought by petitioner, an employee of the American Oil Company, located in Whiting, Indiana, before the National Labor Relations Board against the Independent Petroleum Workers of America, Inc., alleging that his rights under 29 U.S.C.A. Section 158 (b) (1) (a) of the act were being violated by the Union. The violation charged was that the Union had failed to process the grievance of petitioner for discriminatory, unfair and invidious reasons. In due course an investigation was made by the National Labor Relations Board, Region Thirteen. The National Labor Relations Board, Region Thirteen, conducted its investigation without ever contacting the petitioner, and therefore was without benefit of petitioner's basis for filing his complaint against the Union. Subsequently the National Labor Relations Board, Region Thirteen, refused to issue a complaint against the Union.

Pursuant to the National Labor Relations Board rules and regulations, the petitioner filed an appeal with the General Counsel of the National Labor Relations Board. In denying the appeal, the General Counsel said "Under all the circumstances, insufficient basis existed for a finding that the Union's refusal to process Hamlet's seniority grievance had been based on arbitrary, irrelevant, or invidious considerations". This finding was made even though the National Labor Relations Board at no time during its investigation conferred with or interviewed the petitioner.

The petitioner then filed a Petition for Review of an Order of the National Labor Relations Board in the United States Court of Appeals for the Seventh Circuit pursuant to 29 U.S.C.A. Section 160 (f). The National

Labor Relations Board filed a Motion to Dismiss the Petition for Review on the grounds that the Court was without jurisdiction. Petitioner filed an answer to said Motion to Dismiss clearly rebutting said position. In addition 29 U.S.C.A. Section 160 (f) clearly states "Any person agrieved by final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the Circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business . . ." Subsequently the United States Court of Appeals for the Seventh Circuit ordered, without opinion, the dismissal of petitioner's Petition for Review. It appears that the United States Court of Appeals for the Seventh Circuit in dismissing petitioner's Petition for Review was following a routine policy in such cases in view of the fact that the National Labor Relations Board's Brief in Support of Its Motion to Dismiss clearly misrepresented and misconstrued cases decided by the United States Supreme Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The questions presented are of profound significance in National Labor Law, because the United States Court of Appeals for the Seventh Circuit dismissed petitioner's Petition for Review of an Order of the National Labor Relations Board on the basis of the National Labor Relations Board's Brief in Support of Its Motion to Dismiss petitioner's Petition for Review of an Order of the National Labor Relations Board, which alleged that said Court was without jurisdiction to review an order of the National Labor Relations Board.

The United States Court of Appeals for the Seventh Circuit in dismissing petitioner's Petition for Review erred in that 29 U.S.C.A. Section 160 (f) states that: "Any person agrieved by a final order of the Board granting or denying in whole or in part the release sought may obtain a review of such order in any United States Court of Appeals in the Circuit wherein the unfair labor practice in question was alleged to have been engaged in . . ."

In **Sokolowski v. Swift and Co.,** D.C. Minn., 1968, 286 F. Supp. 775, the Court held that the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. In **United Electrical Contractors Association v. Ordman** D.C. N.Y., 1965, 253 Supp. 752 the Court held that a Court has no power to order a General Counsel to issue a complaint, and no power to require the Board to issue an order in a matter not before the Board. However, this Court in **Vaca v. Sipes,** 386 U.S. 171 (1967), 87 S.Ct. 903 rejected the notion that the judiciary was without jurisdiction to review an order of the National Labor Relations Board. The Court referring to its decision in **Steele v. Louisville N.R. Co.,** 323 U.S. 192, 65 S.Ct. 226 said that it recognized that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. Since the Steele case, said the Court, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Then, referring to the National Labor Relations Board's decision in **Miranda Fuel Company,** 140

N.L.R.B. 181 (1962), where the Board held for the first time that a union's breach of its statutory duty of fair representation violates N.L.R.A. Section 158 (b), the Court said, were we to hold, as petitioners and the Government urge, that the Courts are foreclosed by the N.L.R.B.'s Miranda Fuel decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of its complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. The existance, said the Court in Sipes, of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of the fair representation doctrine. For these reasons, said the Court, we can not assume from N.L.R.B.'s tardy assumption of jurisdiction in these cases that Congress, when it enacted N.L.R.A. Section 8 (b) as amended 158 (b) in 1947, intended to oust the Courts of their traditional jurisdiction to curb arbitrary conduct by the individual employees statutory representative.

In the case before the Court the petitioner also alleges that he was denied due process of law by the National Labor Relations Board in that the Board in conducting its investigation failed to contact or interview the petitioner to discover the basis for his complaint against the union. However the Board did contact the union and based its refusal to issue a complaint solely on the basis of whatever information it received from the union. Had the N.L.R.B. interviewed the petitioner as the due process clause would seem to require, it would have discovered that the petitioner's seniority problems arose as a direct result of his being shifted from one

department to another because of the fact that he was and continues to be a practicing Seventh Day Adventist and therefore had to be excused from work on Friday at sunset. Prior to this shifting of the petitioner from department to department, he had been allowed to practice his religion without interference or pressure. Had N.L.R.B.'s investigation included an interview with petitioner, it would have discovered that the petitioner had been penalized for practicing his religion in that he was suspended from work on several occasions. Further, had N.L.R.B.'s investigation included an interview with the petitioner, it would have discovered that the petitioner had in fact signed into the grease department in 1966 and that other individuals signed into the department in 1971 and were placed above the petitioner in seniority status. Had N.L.R.B's investigation included an interview with the petitioner, it would have discovered that the union, as petitioner's sole bargaining agent, had discriminatorily failed to process his grievance in violation of 29 U.S.C.A. Section 158 (b) (1) (a).

CONCLUSION

The present case is illustrative of a serious misapplication of the law by the United States Court of Appeals for the Seventh and Third Circuits. It is imperative that this Court settle the questions involved.

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On March 12, 1971, petitioner filed an unfair labor practice charge against the Union,[1] alleging that the Union, his collective bargaining representative, had, for unfair and invidious reasons, refused to process his seniority grievance against the Com-

[1] Independent Petroleum Workers of America, Inc. (currently known as National Oil Workers Union, Local 1, Inc.). The charge alleged a violation of Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A).

pany.[2] The Board's Regional Director, after investigation, dismissed the charge on the ground that the Union's failure to process the grievance had not been for invidious or arbitrary reasons, but had been based on its judgment that the grievance lacked merit (Pet. App. A, pp. A-3 to A-4). Petitioner appealed to the General Counsel of the Board, and he sustained the findings of the Regional Director (Pet. App. A, pp. A-2 to A-3).[3]

Petitioner then filed a petition in the United States Court of Appeals for the Seventh Circuit, seeking review of the General Counsel's refusal to issue an unfair labor practice complaint. The Board moved to dismiss the petition on the ground that the General Counsel's refusal to issue a complaint is not a final order within the meaning of Section 10(f) of the Act, 29 U.S.C. 160(f).[4] The court of appeals granted

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[2] American Oil Company.

[3] The General Counsel found that the nine employees alleged to have been improperly granted higher seniority than petitioner had, in fact, qualified for such seniority under the collective bargaining agreement between the Company and the Union. Moreover, he noted that the investigation had revealed no animus by the Union against petitioner. Petitioner's suggestion that the General Counsel was not aware of his position at the time of the decision (Pet. 7-8) is unfounded. Petitioner had submitted to the General Counsel, in connection with the appeal, a signed statement explaining his position.

[4] Section 10(f) provides that: "Any person aggrieved by a final order of the Board granting or denying in whole or part the relief sought may obtain review of such order" in the appropriate court of appeals.

the motion and dismissed the petition (Pet. App. A, pp. A-1 to A-2).

2. The court below correctly dismissed the petition to review the General Counsel's refusal to issue an unfair labor practice complaint on his charge. Under Section 10(f) of the Act (n. 4, *supra*), a court of appeals has jurisdiction to review only a "final order of the Board." It is well settled that the action of the General Counsel in refusing to issue a complaint is not a "final order of the Board," within the meaning of Section 10(f). *Lincourt* v. *National Labor Relations Board*, 170 F.2d 306 (C.A. 1); *Manhattan Construction Co.* v. *National Labor Relations Board*, 198 F.2d 320, 321-322 (C.A. 10); *Anthony* v. *National Labor Relations Board*, 204 F.2d 832, 833 (C.A. 6); *Contractors Ass'n of Philadelphia and Eastern Pennsylvania* v. *National Labor Relations Board*, 295 F.2d 526 (C.A. 3), certiorari denied, 369 U.S. 813.[5]

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[5] Moreover, in view of the broad discretion conferred by Section 3(d) of the Act, 29 U.S.C. 153(d), the General Counsel's decision not to issue a complaint is not even reviewable by means of an independent suit in the district court. *Vaca* v. *Sipes*, 386 U.S. 171, 182; *Balanyi* v. *Local 1030, IBEW, and National Labor Relations Board*, 374 F. 2d 723, 726 (C.A. 7); *United Electrial Contractors Ass'n* v. *Ordman*, 366 F. 2d 776 (C.A. 2), certiorari denied, 385 U.S. 1026; *Hourihan* v. *National Labor Relations Board*, 201 F. 2d 187 (C.A.D.C.), certiorari denied, 345 U.S. 930.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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APRIL 1972.

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